



UNITED STATES DEPARTMENT OF THE INTERIOR

OFFICE OF THE SECRETARY

WASHINGTON, D.C. 20240

DEC 29 1982

DECISION ON THE STATUS OF KUWAIT
UNDER THE MINERAL LEASING ACT OF
1920 (30 U.S.C. § 181 et seq.)

On July 8, 1982, the Department of the Interior requested public comment on the laws, customs and regulations of Kuwait to assist the Department in making a determination on the status of that country under section 1 of the Mineral Leasing Act of 1920, 30 U.S.C. § 181. 47 Fed. Reg. 29720. The comment period was extended by notice published on August 16, 1982. 47 Fed. Reg. 35559. This inquiry will determine the eligibility of citizens of Kuwait to own interests, through stock ownership, stock holding or stock control, in leases and permits issued pursuant to the Mineral Leasing Act of 1920, 30 U.S.C. § 181 et seq. ("the Act"), and the Mineral Leasing Act for Acquired Lands, 30 U.S.C. § 351 et seq. The minerals in question are deposits of oil, gas, coal, sulphur, phosphate, potassium, sodium, oil shale and gilsonite owned by the United States and subject to disposition under the Act as well as oil or gas transportation pipeline rights of way issued under the Act.

I. Section 1 of the Act

Section 1 of the Act authorizes leasing of lands and disposition of identified minerals to citizens of the United States, associations of such citizens, domestic United States corporations and, in certain circumstances, municipalities and other governmental entities. Citizens of foreign countries may invest in leases and permits issued pursuant to the Act only through the stock of domestic United States corporations. Section 1 limits this right of investment in the following manner:

Citizens of another country, the laws, customs or regulations of which deny similar or like privileges to citizens or corporations of this country, shall not by stock ownership, stock holding, or stock control, own any interest in any lease acquired under the provisions of this Act.

II. Public Comments

In response to the request for public comments, the Department received 391 comments. The vast majority of the commenters

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did not provide information concerning the laws, customs or regulations of Kuwait. Rather, most were quite brief and expressed general opposition to oil and gas development in certain parts of the country, or to any investment in the domestic oil and gas industry by citizens of Kuwait and other "OPEC" nations, or to both. In short, these comments were conclusory and did not provide factual information that would be helpful in analyzing the laws, customs, and regulations of Kuwait. Several commenters argued that since Kuwait has nationalized its oil industry, it obviously denies similar or like privileges to citizens of this country. These commenters were either unaware of or opposed to this Department's long-standing interpretation and application of section 1 of the Act that nationalization does not by itself render a nation non-reciprocal. These comments also were not helpful in providing information to analyze the status of Kuwait. One commenter provided a detailed analysis of section 1 and Kuwait law. This commenter argued that the legislative history and prior administrative interpretations of section 1 of the Act support the proposition that foreign citizens should not be disqualified unless the foreign country in question imposes unreasonable or discriminatory restrictions on opportunities by United States citizens to invest in the mineral resources of the foreign country. It further argued that in 1919 Congress contemplated leaving oil producing countries free to develop their own oil exploitation policies provided they did not discriminate against the United States. The commenter concluded that citizens of Kuwait should not be disqualified under section 1 of the Act. No comments were received from other government agencies.

In addition to the comments, the Department considered the significant volume of information in Departmental files, including information on Kuwait law provided by the Government of Kuwait through the Department of State.

III. Standard of Review

In his memorandum to the Secretary of February 2, 1982, the Associate Solicitor, Energy and Resources, identified three standards under which the laws, customs and regulations of a foreign country are to be analyzed in determining whether laws, customs and regulations of a foreign country deny similar or like privileges to citizens of the United States. These standards resulted from a review of the statutory language, legislative history and Departmental administration of section 1 of the Act beginning in 1920.

Under the first standard identified by the Associate Solicitor, the Department must find that the foreign country allows stock participation by United States citizens in corporations which, in turn, are not precluded or unreasonably restricted from participating in the foreign country's mineral resources on its public lands because of the United States citizen's stock ownership. If the foreign country prohibits stock ownership, the Department applies the second standard to determine whether the foreign country allows other opportunities for investment or participation in the mineral resources on its public lands. In the event the foreign country restricts investment or participation in its mineral resources to state-owned entities, the Department must, under the third standard, determine whether discrimination exists against citizens or corporations of the United States.

IV. The Laws, Customs and Regulations of Kuwait

The laws, customs and regulations discussed below are those applicable to exploration and development of mineral resources in Kuwait and to stock ownership, stock holding and stock control in that country by citizens and corporations of the United States.

Laws

The 1962 Constitution of the State of Kuwait.

Article 21 of the Constitution decrees that all natural resources and derivative revenues are the property of the State. Article 152 authorizes the granting of concessions for exploitation of natural resources only "by a law and for a limited period." There is no restriction in the Constitution on the ability of aliens to hold or to invest in such concessions.

Law No. 19 of 1973 concerning the Conservation of Petroleum Resources.

This law authorizes the Government of Kuwait to issue regulations governing all aspects of petroleum exploration and development.

Decree Law No. 6 of 1980 establishing the Kuwait Petroleum Corporation.

This law established the Kuwait Petroleum Corporation (KPC), which is wholly owned by the Government of Kuwait. KPC, through a subsidiary, owns the sole outstanding concession

for the exploration and development of hydrocarbon substances found in Kuwait, except for one concession in the offshore area jointly administered by Kuwait and Saudi Arabia. KPC is chartered to engage in all phases of the hydrocarbon industry, including exploration, development and transportation (Article 3). KPC is authorized in carrying out these purposes to participate with other companies and to establish companies in partnership with others (Article 5). Decree Law No. 6 assigned the Government-owned shares of various companies involved in hydrocarbon activities in Kuwait to KPC (Article 8).

Law No. 15 of 1960 (of Commercial Companies)

This law allows foreign participation in commercial activities within the country of Kuwait through partnerships and joint stock companies, provided that 51% of the capital holdings is owned by Kuwaiti citizens. This law also authorizes the formation of joint ventures with no limitation on citizenship. This law is the only expression of Kuwait policy with regard to foreign investment brought to the attention of the Department. The Department understands that outside the scope of Law No. 15, a foreign corporation may directly engage in commercial activities in Kuwait, although in some circumstances the foreign corporation must employ a Kuwaiti agent.

Customs and Regulations

The prevailing custom in Kuwait has been to consolidate all oil and gas activity under the ownership of the Government and, since 1980, in the Kuwait Petroleum Corporation (KPC). This consolidation included the acquisition by the Government of concession rights previously granted to foreign companies and their subsequent assignment to KPC. One foreign-owned company continues to operate offshore in the area under the joint administration of Kuwait and Saudi Arabia. KPC has not exercised its authority to engage in joint operations with foreign companies nor has the Government of Kuwait issued any new concessions to foreign companies. Similarly, no companies with Kuwaiti stockholders are currently involved in oil and gas activities with KPC or through new concessions. However, there is no evidence that any custom or regulation discriminates against investment by United States citizens.

V. Analysis

From our understanding of the laws, customs and regulations of Kuwait, a concession to explore for and develop mineral resources may be issued by the Government of Kuwait. These concessions would be issued to an entity organized under Law No. 15 or to foreign entities. In some instances, foreign entities are required to conduct business in Kuwait through

Kuwaiti agents. Other than in the offshore joint administration area, the only entity currently authorized to conduct oil and gas activities is the Kuwait Petroleum Corporation (KPC), which is a state-owned company. KPC is authorized by law to join with others to conduct these activities, presumably with or through an entity organized under Law No. 15 or with a foreign entity authorized to do business directly in Kuwait. At present, KPC has not engaged in any joint participation projects.

Under Law No. 15, United States citizens may own up to 49% of the stock in a Kuwaiti corporation. Kuwaiti law contains no limitation or restriction on the activities of a corporation which has stockholders who are citizens of the United States. Such corporations may, if the opportunity is presented, participate independently or with the Kuwait Petroleum Corporation (KPC) in any phase of the hydrocarbon industry. Similarly, United States citizens may engage in joint ventures independently or with KPC, if the opportunity is presented. The 49% limitation is not an unduly harsh or restrictive limitation on stock or partnership capital ownership. While this requirement may alter the opportunity for economic return to the United States stockholder, and thus be a factor in the investment decision, it does not render the stock participation illusory or meaningless. This limitation is similar to the Canadian law which the Secretary found does not deny similar or like privileges under section 1 of the Act in his decision of February 2, 1982, concerning the reciprocity status of Canada.

Finally, no discrimination exists under the law of Kuwait against citizens of the United States. KPC is wholly-owned by the Government of Kuwait. No Kuwaiti citizens may invest in KPC because the law of Kuwait does not allow such investment. Moreover, we have no evidence that KPC has engaged in any joint participation activities with companies owned by Kuwaiti citizens to the exclusion of companies owned in whole or in part by citizens of the United States. Thus, the laws, customs and regulations of Kuwait are applicable to all private investment in mineral resources, whether that investment is by citizens of Kuwait, by citizens of the United States, or by citizens of any other country.

The Department received no comments or information concerning the laws, customs or regulations of Kuwait with regard to minerals other than oil and gas which differ from those applicable to oil and gas.

The restriction on foreign ownership of interests in federal onshore mineral leases and permits had two purposes. First, it was designed to avoid foreign retaliation against, and to discourage foreign discrimination against, investments in minerals by citizens and corporations of the United States. H.R. Rep. No. 398, 66th Cong., 1st Sess., p. 11 (1919). Second, it was intended to prevent adverse impacts from uncontrolled and unchecked exportation of domestic mineral resources. Id. The Act itself was intended to "promote the mining of coal, phosphate, oil, oil shale, gas, and sodium on the public domain." 41 Stat. 437. In section 32 of the Act, 30 U.S.C. § 189, Congress empowered the Secretary "to prescribe necessary and proper rules and regulations and to do any and all things necessary to carry out and accomplish the purposes of this Act."

From the earliest time, the Department has focused on the issue of the effect of investment by United States citizens in foreign corporations on the ability of that corporation to participate in the mineral resources of the foreign country. E.g., letter from Secretary of the Interior to Secretary of State dated October 19, 1920. This emphasis on discrimination, which originally arose in the Congressional debate on section 1 (discussion among Congressmen Snell, Sinnott and Evans, 58 Cong. Rec. 7528-7529 (1919)), was ratified in a letter from the Deputy Solicitor to the Legal Advisor for Economic and Business Affairs, Department of State, dated August 23, 1974. In this letter, the Deputy Solicitor emphasized that the citizenship of an individual or corporation was irrelevant to investment in the coal resources of Great Britain. After finding that the British government had nationalized the British coal industry and that no private participation, British or foreign, was allowed, the Deputy Solicitor concluded that this did not constitute the discrimination required to disqualify investment by British citizens under section 1 of the Act. The laws, customs, and regulations of Kuwait simply do not prohibit private (and foreign, on an equal basis) investment and participation in mineral resources development, unlike the assumption made in the 1974 letter regarding the law of Great Britain.

VII. Decision

The above analysis demonstrates that the laws, customs and regulations of Kuwait do not discriminate against citizens of the United States. No evidence exists that a company has

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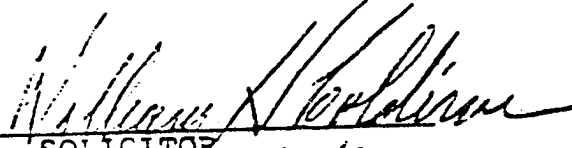
been denied participation in mineral resources of Kuwait since the adoption of Decree Law No. 6 because citizens of the United States held an interest.

Based on the facts described above, the laws, customs and regulations of Kuwait do not deny similar or like privileges to citizens or corporations of the United States within the meaning of section 1 of the Mineral Leasing Act of 1920, 30 U.S.C. § 181. Therefore citizens and corporations of Kuwait may, through stock ownership, stock holding or stock control in corporations of the United States, own interests in federal mineral leases and permits subject to section 1 of the Act.

Date: 12/22/54


Assistant Secretary--Land and
Water Resources

I Concur:


SOLICITOR
12/29/54